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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re AMBAC BOND INSURANCE CASES., [Two consolidated cases.] [*]	A142632 JCCP NO. 4555

Having previously denied a motion to dismiss the present appeal, the court on its own motion has reconsidered the motion to dismiss.

In this consolidated proceeding, plaintiffs, a collection of public and nonprofit entities,[1] have alleged claims for, among other things, negligent misrepresentation, violations of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), and violations of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) against a

[*] *Contra Costa County v. Ambac Financial Group* (S.F. Super. Ct. No. CJC-08-004555) and *The Olympic Club v. MBIA, Inc.* (S.F. Super. Ct. No. CGC-09-487058).

[1] Public entity plaintiffs are: City of Los Angeles, City of Oakland, City of Redwood City, City of Richmond, City of Riverside, City of Riverside as successor agency to City of Riverside Redevelopment Agency, Public Financing Authority of City of Riverside, City of Sacramento, City of San Jose, City of San Jose as successor agency to redevelopment agency of San Jose, City of Stockton, City of Stockton as successor agency to Redevelopment Agency of the City of Stockton, Public Financing Authority of City of Stockton, City and County of San Francisco, Alameda County, Contra Costa County, San Mateo County, Tulare County, East Bay Municipal Utility District, Los Angeles Department of Water and Power, Los Angeles World Airports, Sacramento Municipal Utility District, Sacramento Suburban Water District and The Regents of the University of California. Nonprofit plaintiffs are: Jewish Community Center of San Francisco and The Olympic Club.

collection of credit rating agencies, including The McGraw-Hill Companies, Inc., now known as McGraw Hill Financial, Inc. and Standard & Poor's Financial Services LLC (collectively S&P), and bond insurers, including Ambac Assurance Corporation (Ambac); MBIA Inc., MBIA Insurance Corporation, and MBIA Insurance Corporation of Illinois (collectively MBIA) (jointly referred to as bond insurers). The claims arise out of what plaintiffs describe as the rating agencies' "dual credit rating system," under which the risk of default of bonds issued by municipalities and nonprofit entities was rated higher than the risk on corporate bonds even though the financial risk factors for the municipal and nonprofit bonds were lower than for the corporate bonds. Plaintiffs also claim that the rating agencies misrepresented the financial condition of the bond insurers, ultimately causing plaintiffs to incur substantial losses when the mortgage market collapsed. In a prior decision, this court upheld in part and reversed in part the trial court's order on defendants' motions to strike the above listed causes of action as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (the anti-SLAPP statute).[2] In the present appeal, plaintiffs seek review of the trial court's attorney fee order under section 425.16, subdivision (c).[3] Having requested and received supplemental briefing on the appealability of the interlocutory attorney fee order, we conclude that the order in its entirety is not now appealable and therefore we shall dismiss the appeal.

Factual and Procedural Background

On October 4, 2010, S&P filed an anti-SLAPP Motion as to the plaintiffs' claims for negligent misrepresentation and violations of the UCL and Cartwright Act. On July 9, 2013, the trial court denied S&P's motion with respect to the negligent misrepresentation and UCL claims but granted the motion as to the claims under the Cartwright Act.

[2] All statutory references are to the Code of Civil Procedure unless otherwise noted.

[3] Section 425.16, subdivision (c) provides in relevant part, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

On December 2, 2011, the bond insurers filed their motion as to the plaintiffs' breach of contract, fraud, UCL and Cartwright Act claims. On May 1, 2012, the trial court denied the bond insurers motion with respect to the breach of contract and fraud claims. The trial court's July 9 order denied the bond insurer's motion with respect to the UCL claim but granted the motion as to the Cartwright Act claims.

In our prior opinion, this court affirmed the trial court's order with respect to S&P's motion but reversed the order insofar as it granted the bond insurers' motion. (*In re Ambac Bond Insurance Cases* (Feb. 18, 2016, A139765) [nonpub.opn.].) [4]

While the prior appeal was pending, the trial court ruled on the parties' motions for attorney fees. By motions filed on September 9 and 10, 2013, plaintiffs sought attorney fees from the bond insurers and S&P. Thereafter, bond insurers and S&P filed motions seeking attorney fees from plaintiffs. The trial court denied plaintiffs' motions in their entirety. The court granted Ambac's motion for fees in the amount of $207,291.72, granted MBIA's motion in the amount of $211,362.44, and granted S&P's motion in the amount of $185,000. Plaintiffs filed a timely notice of appeal.

Discussion

"Section 904.1 sets forth a list of appealable judgments and orders. Section 904.1 is a codification of the 'one final judgment rule,' and lists the exceptions to the rule. [Citation.] Included in the section 904.1 list of exceptions to the one final judgment rule are: (1) an interlocutory judgment for sanctions in an amount exceeding $5,000; (2) an order for sanctions in an amount exceeding $5,000; and (3) 'an order granting or denying a special motion to strike under Section 425.16.' [Citation.] The list includes approximately 13 separate types of orders and judgments that may be directly appealed, and provides that only the enumerated interlocutory judgments may be directly appealed, thus excluding any interlocutory judgments that are not on the list. [Citation.] An interlocutory judgment is one that 'disposes of fewer than all of the causes of action framed by the pleadings,' such that a cause of action is still pending between the parties

[4] Plaintiffs' request for judicial notice of our prior opinion is granted.

despite the judgment." (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 780.) The attorney fee order at issue in the present appeal is clearly interlocutory and thus is not now appealable unless it comes within one of the enumerated exceptions..

Initially, the parties assert, without any discussion, that the appeal of the portion of the order awarding attorney fees to defendants is authorized by section 904.1, subdivision (a)(12) as "an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." We disagree. An attorney fee award to a prevailing defendant under section 425.16 is not an order for sanctions within the meaning of section 904.1, subdivision (a)(12). "An award of sanctions is markedly different from an award of attorney fees under section 425.16. Like a punitive damages award in civil litigation, an award of sanctions is intended to punish a party for bad faith conduct, not to compensate or reward the opposing party. Section 425.16, subdivision (c), on the other hand, is intended to compensate the SLAPP defendant for attorney fees incurred in bringing a motion to strike, not to punish the SLAPP plaintiff. Like Civil Code section 1717, an award under . . . section 425.16, subdivision (c), is limited to costs and attorney fees, whereas sanctions may cover any expenses incurred." (*Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1209; see also *City of Colton v. Singletary*, *supra*, 206 Cal.App.4th at p. 781 [order awarding attorney fees under § 425.16 to prevailing defendant does not come within plain language of § 904,1, subd. (a)(12).].) In *Doe v. Luster* (2006) 145 Cal.App.4th 139, 146, the court noted that "[b]ecause an award of attorney fees to a *plaintiff* prevailing on the motion is to be made 'pursuant to section 128.5,' and only if the motion 'is frivolous or is solely intended to cause unnecessary delay,' if the amount awarded exceeds $5,000, it is appealable pursuant to section 904.1, subdivision (a)(12)." This limited exception is not applicable to an order awarding attorney fees to a prevailing defendant.

Neither is the order directly appealable under section 904.1, subdivision (a)(13) as an order granting or denying a special motion to strike under section 425.16. (*Doe v. Luster*, *supra*, 145 Cal.App.4th at pp. 145-146 [§ 904.1, subd. (a)(13) does not authorize "an immediate appeal from the award or denial of attorney fees to the prevailing moving

party or from the denial of attorney fees to the prevailing party opposing a special motion to strike"]; *City of Colton v. Singletary*, *supra*, 206 Cal.App.4th at p. 781 ["The plain language of section 904.1 does not include an award of attorney's fees among the exceptions to the one final judgment rule. The statute mentions sanctions, and the granting or denial of an anti-SLAPP motion, but does not, by its plain language, make an order for attorney's fees directly appealable."].)

While review of an attorney fee order has been permitted in limited circumstances under the collateral order exception (*City of Colton v. Singletary*, *supra*, 206 Cal.App.4th at pp. 781-782; *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 273-275), the exception has been applied only when the attorney fee order is reviewed on appeal simultaneously with the ruling on the merits of the SLAPP motion. As the court explained in *Baharian-Mehr*, *supra*, at pages 273-275, "While we agree with the holding in *Doe* [*v. Luster*] that a separate attorney fee order should not be heard on interlocutory appeal," when the attorney fee order is challenged at the same time as the ruling on the merits, "it would be absurd to defer the issue of attorney fees until a future date, resulting in the probable waste of judicial resources." (See also Eisenberg et al. Cal Practice Guide: Civil Appeals and Writs (The Rutter Guide 2015) ¶¶ 2:135.13 to 2:135.13a, pp. 2-81 to 2-82 ["An order granting or denying attorney fees rendered *simultaneously* with a ruling on an anti-SLAPP motion is reviewable on appeal from the ruling on the anti-SLAPP motion" but "[a]n order granting or denying attorney fees rendered subsequent to a ruling on an anti-SLAPP motion is not *within the scope of the statutory provisions for direct appeal of a ruling on an anti-SLAPP motion* [citation] and thus is *not* immediately appealable pursuant to those statutory provisions."].)

Here, the attorney fee motions were made and decided well after the ruling on the merits of the anti-SLAPP motions. Our review of the merits is already complete and, as acknowledged by the parties, our decision on the merits has rendered moot most if not all

of plaintiffs' appeal with respect to the Bond Insurers' attorney fees.[5] If the collateral order exception were applicable in this instance, the limited exception would swallow the general rule that interlocutory attorney fee awards under section 425.16 are not directly appealable. Unlike in *Baharian-Mehr v. Smith, supra,* 189 Cal.App.4th at pp. 274-275, the interests of judicial efficiency would not be served be permitting a direct appeal in these circumstances.

Finally, contrary to plaintiffs' argument, delaying review of the attorney fee award until after entry of final judgment does not threaten harm to the plaintiffs. Unlike the ability to immediately enforce an award of sanctions under section 128.5 (see *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615 [sanctions imposed under section 128.5 "have the force and effect of a money judgment, and are immediately enforceable through execution, except to the extent the trial court may order a stay of the sanction"]), we see no reason why attorney fees that the court finds a defendant entitled to recover for partially prevailing on a special motion to strike should be treated differently from other interlocutory orders determining an amount to be included in a subsequent judgment—unenforceable until incorporated in the judgment at the conclusion of the action (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 833 ["Apart from the sphere of private attorney general actions under . . . section 1021.5, the award of interim attorney fees in California remains a wholly untested and novel concept that is ordinarily barred by explicit statutory language."]). Although section 425.16, subdivision (c) provides for an award of attorney fees, the statute does not explicitly make the award immediately

[5] The parties agree that plaintiffs' appeal of the portion of the order awarding bond insurers attorney fees has been rendered moot by our prior decision. Our decision also impacts plaintiffs' challenge to the order denying their motion for fees. Plaintiffs argue that the court erred in concluding that no fees could be awarded to plaintiffs because "a partial victory by a defendant precludes a determination that the motion was frivolous or solely intended to cause unnecessary delay" and as a result of this improper conclusion, the trial court failed to analyze whether the portion of the bond insurers' motion on which plaintiffs prevailed was frivolous. Because the bond insurers are no longer partial victors, plaintiffs' entitlement to attorney fees requires reconsideration by the trial court in the first instance.

enforceable. Deferring the right to enforce the order until review is available at the termination of the proceedings is not only a matter of fairness, but is consistent with the many reasons supporting the final judgment rule and is not at odds with the reasons for which the attorney fees are awarded.

"In general, the party prevailing on a special motion to strike may seek an attorney fees award through three different avenues: simultaneously with litigating the special motion to strike, by a subsequent noticed motion, or as part of a cost memorandum at the conclusion of the litigation." (*Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 992.) If sought after a ruling on the special motion to strike and before the entry of judgment, the fees authorized under section 425.16 should be added to and become a part of the final judgment. (§ 1033.5, subdivision (a)(10); § 685.090, subd. (a).) The fee award will then become enforceable at the same time as review becomes available. (Cf. *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426-1434 [prevailing SLAPP defendant's enforcement of a judgment awarding fees and costs under § 425.16 requires plaintiff to post an appropriate appeal bond or undertaking to stay enforcement].)

"The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal." (*Doe v. Luster*, *supra*, 145 Cal.App.4th at p. 145.) Accordingly, the present appeal must be dismissed.

Disposition

The appeal is dismissed. The parties shall bear their own costs on appeal.

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Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Jenkins, J.